00-0471 E.B. v. TKO Construction Issued: 3/11/02

Each of the parties in this workers' compensation proceeding ask the Utah Labor Commission to review the Administrative Law Judge's award of permanent partial disability compensation to E. B. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Should the Commission accept the parties' oral agreement limiting Mr. B.'s claim for permanent partial disability compensation.[1]

BACKGROUND

Mr. B. was working for TKO on June 21, 1999, when he accidentally fell and injured his feet. TKO and its workers' compensation insurance carrier, the Workers' Compensation Fund (referred to jointly as TKO) accepted liability for workers' compensation benefits due Mr. B. as a result of his injuries. However, a dispute developed between TKO and Mr. B. regarding the extent of Mr. B.'s permanent disability. TKO's consulting physician concluded that Mr. B. had suffered a 12% whole person impairment, while Mr. B.'s treating physician found an 18% whole person impairment.

The parties agreed to submit the foregoing dispute to Dr. Colledge, who is both a physician in private practice and the Labor Commission's medical director.[2] The parties also agreed to be bound by Dr. Colledge's rating of Mr. B.'s impairment, subject to a floor of a 12% impairment rating and a cap of a 20% impairment rating. The parties advised the ALJ of their desire to refer the impairment dispute to Dr. Colledge, but did not inform the ALJ of their "high/low" agreement.

Dr. Colledge evaluated Mr. B. and concluded that his work injuries constituted a 25% whole person impairment. The parties then notified the ALJ for the first time of the high/low agreement and asked the ALJ to abide by the 20% cap included in the agreement. The ALJ refused to do so and instead awarded permanent partial disability compensation to Mr. B. based on Dr. Colledge's 25% impairment rating.

DISCUSSION AND CONCLUSION OF LAW

The question before the Commission is whether the parties' private high/low agreement is binding on the ALJ and Commission. Although the high/low agreement was never reduced to writing, the parties concur that the agreement bound them to accept Dr. Colledge's rating of Mr. B.'s impairment, subject to a 12% floor and a 20% cap. In other words, Mr. B. surrendered his right to claim more than a 20% impairment, while TKO surrendered its right to claim less than a 12% impairment. The agreement did not address Mr. B.'s possible claims to other benefits, nor did the agreement purport to be a full and final settlement of all Mr. B.'s claims.

As circumstances have developed, application of the parties' high/low agreement would have the effect of reducing Mr. B.'s claim from a 25% impairment to a 20% impairment.

In considering the effect, if any, that should be given to the parties' agreement, the Commission turns to the statutory provisions of the Utah Workers' Compensation Act, as interpreted by Utah's appellate courts.

Section 34A-2-412(6)(a) of the Act, applicable to Mr. B.'s claim, provides that "permanent partial disability compensation **shall** be awarded by the commission based on the medical evidence." (Emphasis added.) Section 34A-2-108(1) of the Act provides that "(e)xcept as provided in Section 34A-2-420, an agreement by an employee to waive the employee's rights to compensation under this chapter . . . is not valid."[3] In Wilburn v. Interstate Elec., 748 P.2d 582, 586 (Utah 1988), the Utah Court of Appeals summarized the holdings of prior appellate decisions interpreting the foregoing statute:

Under this provision, settlements are appropriate only when the compensable nature of the worker's injury is disputed and the worker's right to recover is doubtful. *See Brigham Young Univ. v. Industrial Comm'n*, 74 Utah 349, 279 P. 889 (1929). Conversely, when the compensability of a worker's compensation claim is not disputed, an employee cannot waive his claim by agreement. *Barber Asphalt Corp. v. Industrial Comm'n, 103 Utah 371, 135 P.2d 266 (1943)*

In applying the foregoing principles to this case, the Commission notes that the compensable nature of Mr. B.'s injuries was not disputed by TKO, nor was his right to workers' compensation benefits doubtful. Mr. B. has a clear right to permanent partial disability compensation for his impairment. Persuasive medical evidence rates that impairment at 25%. Because application of the parties' high/low agreement would reduce Mr. B.'s permanent partial disability compensation from 25% to 20%, the Commission agrees with the ALJ's conclusion that the high/low agreement is invalid under §34A-2-108 of the Act. Consequently, Mr. B. is entitled to receive permanent partial disability compensation based on a 25% impairment rating, as established by the preponderance of medical evidence.

ORDER

The Commission affirms the ALJ's award of permanent partial disability compensation to Mr. B. and denies TKO's motion for review. It is so ordered.

Dated this 11th day of March, 2002.

R. Lee Ellertson, Commissioner

1. Although Mr. B. also raised the issue of attorneys fees in his motion for review, that issue was resolved in an supplemental order issued by the ALJ on December 17, 2001.

2. The ALJ characterizes Dr. Colledge's services in this matter as those of a Commission-appointed "medical panel" authorized by §34A-2-601 of the Act. The parties contend Dr. Colledge was hired in his individual capacity by the parties. With respect to the issue before the Commission, this is a distinction without a difference. But it is plain the parties never told the ALJ they intended to engage Dr. Colledge as a private physician. The ALJ believed Dr. Colledge was to act as a Commission-appointed medical panel. Otherwise, the ALJ would not have formally appointed him to that position or distributed his report to the parties as a medical panel report. Even after the ALJ took these actions, the parties did not make any effort to advise the ALJ that Dr. Colledge was serving as a private consulting physician.

3. The exception for §34A-2-420 is inapplicable in this case. The parties' agreement was neither "full and final" nor was it reviewed or approved by the ALJ.